IN THE

Supreme Court of the United States

October Term, 1972.

No. 71-1470.

ALTON J. LEMON, PRISCILLA REARDON, KELLY J. WORRELL and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEE PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS.

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QUESTIONS PRESENTED.

(1) Did the Court below abuse its discretion in its application of the standards of *Linkletter v. Walker*, 381 U. S. 618 (1965) in determining that this Court's decision and order in *Lemon v. Kurtzman*, 403 U. S. 602 (1971) should be given prospective application only and thereby permit the Commonwealth of Pennsylvania to now pay to all eligible secondary schools, funds, contracted for and spent by these schools for secular educational services in reliance thereon, prior to this Court's decision and order of June 28, 1971? (Answered in the negative by the Court below.)

(2) Does the mere ministerial act of payment now, to non-public schools in Pennsylvania, of funds contracted and educational services rendered prior to this Court's decision in *Lemon v. Kurtzman*, 403 U. S. 602 (1971) constitute undue entanglement between Church and State so as to undermine the underlying basis of this Court's decision declaring the Pennsylvania Act unconstitutional. (Answered in the negative by the Court below.)

(3) Are not plaintiffs barred from now objecting to payment by the Commonwealth of Pennsylvania for funds contracted to be paid for the school year 1970-1971, where plaintiffs never pressed for injunctive relief to bar payments until after three school years had passed, contracts had been awarded, the schools had rendered services, had been paid for two years, and had made expenditures in reliance that they would likewise be paid for the third year now in issue? (Not answered specifically by the Court below, but by inference, answered yes.)

(4) Do plaintiffs have standing to contend that the Commonwealth did not receive fair value for the educational services rendered of the schools now seeking reimbursement? (Not answered by the Court below.)

STATEMENT OF THE CASE.

Appellants, plaintiffs below, brought this action before a three judge District Court challenging the constitutionality of the "Pennsylvania Nonpublic Elementary and Secondary Education Act", Act of June 19, 1968, P. L. —, No. 109, 24 P. S. § 5601 et seq. ("Act 109"), on June 3, 1969 almost one year after the effective date of Act 109.

The Legislature of Pennsylvania, had determined, "that a crisis in elementary and secondary education exists," in Pennsylvania and the nation;[1] that nonpublic education "through providing instruction in secular subjects, makes an important contribution" to the public welfare of Pennsylvania;[2] and educates more than 20 percent of all elementary and secondary school pupils in Pennsylvania.[3] Through Act 109, the Legislature authorized the Superintendent of Public Instruction to purchase secular education services in mathematics, modern foreign languages, physical science, and physical education from nonpublic schools for the benefit of the nonpublic school children.

Appellants' suit was not brought until after such contracts had been entered into and the services so contracted for had been provided for the school year 1969-1970. Shortly after suit was brought, Appellants abandoned any attempt to seek a preliminary injunction[4] to block payment

1. 24 P. S. § 5602(1) (pp. 12 app, 13 app to Jurisdictional Statement).

2. 24 P. S. § 5602(3) (p. 13 app, Jurisdictional Statement).

3. 24 P. S. § 5602(2) (p. 13 app, Jurisdictional Statement).

4. The complaint filed in this action sought as part of its relief a preliminary injunction against defendants pending the trial of the issues. (Plaintiffs' complaint paragraph 23(3) and see paragraph 17 of plaintiffs' complaint.) This remedy was abandoned by Appellants, who so notified the court by letter of August 28, 1969 from their counsel, Henry W. Sawyer, III, to Judge Troutman, stating:

"In what I thought was a sensible recognition of the practical realities of the situation, I withdrew from any attempt to prevent

for the first year, and on September 2, 1969, according to the terms of Act 109, the state paid the contracting nonpublic schools the first installment for the services performed in 1969-1970.

Appellees, defendants below, filed a motion to dismiss the complaint. The Pennsylvania Association of Independent Schools, an association of 70 accredited independent elementary and secondary schools moved to intervene as a party defendant. This motion was granted as to the motion to dismiss, without prejudice to the Association's application for more general intervention after disposition of the motion to dismiss.

On November 28, 1969, the three judge court, in an opinion by Troutman, J., joined in by Luongo, J., with Judge Hastie dissenting, sustained the motion to dismiss, holding Act 109 constitutional. On December 2, 1969, the second scheduled payment to nonpublic schools took place. Appellants, notwithstanding their obvious intention to appeal the decision, took no steps to prevent this payment.

Relying upon the constitutionality of Act 109, and supported by the holding of the three judge court, the nonpublic schools, prior to January 15, 1970, and in accordance with the procedures and timetable established by the Superintendent of Public Instruction, renewed their contracts for reimbursement under the Act for similar services to be performed during the 1970-1971 school year. The services contracted for were duly performed during the

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4. (Cont'd.)
initial payment to the nonpublic schools scheduled for September 2. According to press reports, checks amounting to $1,212,232.31 will be mailed that day to 1178 private and parochial schools. The next payment, in a somewhat larger amount, is scheduled for December 2."

Notwithstanding Mr. Sawyer's intention expressed in this letter to enjoin the payments scheduled for December 2, 1969, no attempt was made to enjoin any reimbursements under Act 109 until Appellants filed their motion for summary judgment in August, 1971.

1970-1971 school year and the schools, fully believing they would be reimbursed as heretofore, incurred expenses and debts which they would not otherwise have incurred except in reliance on the Commonwealth's promise to pay them (A12, ¶ 3).

On June 28, 1971, this Court, in *Lemon v. Kurtzman*, 403 U. S. 602, declared Act 109 unconstitutional under the Establishment Clause and held that:

¶ Act 109 had the requisite secular legislative purpose—i.e. to aid education—not advance religion. 403 U. S. at 613;

¶ Declined to decide whether the principal or primary effect of Act 109 advanced or inhibited religion, 403 U. S. at 613[5]; thus, in effect leaving undisturbed the holding of the lower court that Act 109 did not have such a primary effect, 310 F. Supp. at 47;

¶ "The cumulative impact of the entire relationship arising under the [statute] . . . involves excessive entanglement between government and religion." 403 U. S. at 614.

The case was remanded for further proceedings consistent with the opinion of this Court.

Appellants then moved for summary judgment and for the first time since Act 109 was enacted, moved for a permanent injunction restraining any further expenditure under Act 109 (A6-A7).[6] Appellees (A12-A14) and inter-

5. This Court thus rejected the contrary arguments vigorously asserted by the Appellants in their brief in the first appeal before this Court. See brief of Appellants, October Term, 1969, No. 1189, pp. 6, 7, 24-31, and addendum. Nevertheless, even though no new or conflicting evidence has been introduced, Appellants again (Appellants' brief at pp. 4, 27-28, 31, 33-35) press on this Court the very arguments rejected in this same case.

6. Pages designated "A" are those printed in the Appellants' Appendix.

venor defendant (A15) filed a motion requesting that any injunction issued be prospective only so as to permit payments under Act 109 for services rendered the previous school year, 1970-1971, prior to this Court's decision. In their motion, the schools stated:

> "*In reliance* upon the validity of the Act and in reliance upon the Commonwealth's obligation to reimburse the schools pursuant to the contracts, the schools, including Defendant Schools, *fully performed* their obligations under the contracts by rendering secular educational services and actually expending sums of money for teachers' salaries, textbooks and instructional materials. *In performing, under the contracts, the Defendant Schools incurred expenses and debts which they would not otherwise have incurred except in reliance upon the Commonwealth's promise to reimburse them for same.* The Commonwealth of Pennsylvania is indebted to said Schools in the amounts provided for under the respective contracts. The Commonwealth of Pennsylvania is thus indebted to said schools in the amounts provided for under the respective contracts." (A12-A13, Emphasis added.)

Appellees' Answer failed to deny, or otherwise put at issue, that the schools had so relied on the contracts. Rather, they admitted the fact of reliance, but went on to state that such reliance was foolhardy and that the defendants proceeded at their own risk. See *Plaintiffs' Answer to Defendants' Motion Re: Framing of Injunction*, paragraphs 3 and 6 (A16-A17).

The three judge court carried out the mandate of this Court, and on February 22, 1972, enjoined any payments under Act 109 for services rendered after June 28, 1971, the

date of this Court's opinion. After extensive briefs and oral argument, the lower Court unanimously held that since the schools had relied, with adequate justification, particularly after its decision holding Act 109 constitutional (9 app, Jurisdictional Statement) and since the state had already collected the funds to be allocated (9 app, Jurisdictional Statement), the state would be permitted to pay the money it owed the schools to reimburse them for secular services performed prior to the Supreme Court decision reversing the lower Court (10 app, Jurisdictional Statement).

The court refused to find that reimbursement from the fund for past services rendered constituted advancement of religion. It held that to allow this payment would not contravene this Court's decision in *Lemon v. Kurtzman* since the issuance of the permanent injunction restraining any future payments of state funds to nonpublic schools removed the alleged excessive entanglement between Church and State for which this Court held Act 109 unconstitutional.

SUMMARY OF ARGUMENT.

The decision of the court below should be affirmed:

¶ *First,* the question is whether there was sufficient evidence to justify the lower Court's decision as a sound exercise of its discretion under the facts of this case. Your Honorable Court has made it clear that in the absence of a showing of an abuse of discretion, the decision of the lower court must be affirmed.

- The facts of this case show beyond a doubt that the exercise of sound discretion demands the finding that it is fair, just, and constitutionally permissible to now permit payment to schools who prior to the order of unconstitutionality contracted for, performed services, and incurred expenses they would not otherwise have incurred, in good faith reliance on the fact they would be paid.

¶ *Second,* this Court held Act 109 unconstitutional because it generated undue future entanglement between government and religion. Since the lower court enjoined any disbursements under the Act for services performed after June 28, 1971, entanglement is no longer at issue in this case.

- The lower court was therefore correct—particularly in light of this Court's holding that Act 109 had a lawful secular purpose—in holding that the mere ministerial act of reimbursement now for services performed prior to this Court's holding that Act 109 was unconstitutional, would not advance religion. It is consistent with the opinion of this Court. The lower court therefore

correctly applied the decisions of this Court in permitting reimbursement and recognizing the reliance of the schools upon the constitutionality of the Act.

- Appellants' contentions that Act 109 had the purpose and effect of aiding religion was rejected by this Court in *Lemon v. Kurtzman*, 403 U. S. at 613. Appellants claim that any direct payment to educational institutions violates the Establishment Clause, was rejected by this court in *Tilton v. Richardson*, 403 U. S. 672 (1971).

¶ *Third*, as the lower court found, application of the principles of equity and fairness to the record of this case compels giving prospective effect only to this Court's decision in *Lemon v. Kurtzman*. Appellants, having admitted in their pleading and at oral argument, that the schools relied on the constitutionality of Act 109, cannot now deny such reliance, especially since the record discloses NO new evidence which supports their argument. Moreover, in attempting to argue that the contracts were a sham, Appellants pursue a contention which has previously been rejected by this Court. Valid and binding contracts were entered into by the Commonwealth and the schools.

¶ *Fourth*, there is no basis for Appellants' contention that to permit reimbursement in this instance, would encourage the various state legislatures to resort to a variety of sham devices to aid religion and seek to make payments during the frequently long delays between passage of the legislation and a final ruling on constitutionality by this Court.

- *In the first place,* this Court in rejecting a similar argument advanced by Appellants in their brief to this Court on the first appeal, found specifically that Act 109 had a proper secular purpose—i.e. to aid education—and not to advance religion—and that the Legislature's declaration of purpose must "be accorded appropriate deference". 403 U. S. at 613.

- *Secondly,* any aggrieved person can seek a preliminary injunction to enjoin payment, and if turned down, get immediate appellate review. Appellants also had this right—but elected not to pursue it. Since Appellants never sought to enjoin any payment until after this Court's decision, their dire predictions are exposed as empty rhetoric lacking any foundation whatsoever.

- *Thirdly,* Appellants lulled the schools into believing that they themselves sought only prospective relief from the Court in this matter.

¶ *Fifth,* considering the fundamental importance of our nation's educational facilities, there can be no doubt that the lower court properly balanced the equities in limiting its injunction order to prospective action.

¶ *Finally,* these plaintiffs lack standing to argue that the Commonwealth did not receive fair value under the contracts. This is a question of state, not federal constitutional law.

ARGUMENT.

I. The Court Below Properly Exercised Its Sound Discretion in Limiting Application of This Court's Decision in *Lemon v. Kurtzman* to Future Contracts, Thereby Permitting Reimbursement by the Commonwealth of Pennsylvania to Non-Public Schools of Funds Contracted for Secular Educational Services Rendered, and Expended in Good Faith by Them in Reliance Thereon, Prior to This Court's Opinion That Pennsylvania Act 109 Was Unconstitutional.

Plaintiffs-Appellants, in their brief (see page 21 et seq.) now seem to have abandoned the contention they advanced so strongly in the Court below, that the rigid Blackstonian principle of absolute retroactivity makes an invalidated statute void ab initio absolutely. And obviously they must, in light of this Court's decisions in *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371 (1940); *Linkletter v. Walker*, 381 U. S. 618 (1965); *Cipriano v. City of Houma*, 395 U. S. 701 (1969).

Thus all parties now seem to agree that:

¶ **"in appropriate cases the Court may in the interest of justice make the rule prospective"; (see *Linkletter v. Walker, supra*, at page 628).**

¶ **That the decision of this Court in *Lemon* must be examined to determine whether limiting its application prospectively only would in any way undermine its underlying basis and its rationale; and if not, then**

¶ **The Court must balance the equities between the parties.**

Thus the real issue narrows down to whether, under the special facts of this case, the Court below erred in concluding that it would be fair, just, and constitutionally permissible to now permit payment to schools who, prior to the order of unconstitutionality, contracted for, performed services, and incurred expenses they would not otherwise have incurred, and in good faith reliance on the fact they would be paid.

And the question further distilled for Your Honorable Court on this appeal, is: whether there was sufficient evidence to justify the Court's decision as a sound exercise of its discretion under the facts that it found. For, in the absence of a showing of an abuse of discretion, this Court has made it clear over and over again that the action of the lower Court must be affirmed. See *Public Service Commission of Missouri v. Brashear Freight Lines,* 114 F. 2d 1 (8th Cir. 1940), rev'd on other grounds, 312 U. S. 621 (1941), rehearing denied, 313 U. S. 598 (1941); *Delno v. Market St. Ry. Co.,* 124 F. 2d 965 (9th Cir. 1942); *Aetna State Bank v. Altheimer,* 430 F. 2d 750 (7th Cir. 1970).

Far from showing even a simple abuse of discretion, the record and facts in this case reveal overwhelmingly that the exercise of sound discretion compels the decision reached by the court below as the only just and fair result.

To hold otherwise would cause the grossest miscarriage of justice, and would result in denying many millions of dollars to the eligible nonpublic religious schools—who are already in the worst financial crisis of their long and outstanding record of providing quality education to a major segment of our young people. In this regard, we ask the Court to take judicial notice of the serious financial crisis facing nonpublic education, as forcefully revealed in a recently issued report of a blue ribbon non-denominational panel of business and civic leaders in Philadelphia ap-

pointed by John Cardinal Krol, Catholic Archbishop of Philadelphia, and headed by John T. Gurash, Board Chairman of INA Corporation.

For the convenience of the Court, we have annexed copies of the abridged edition of the Gurash report to this brief as Exhibit "B". It speaks in clear and eloquent terms of the critical financial crisis facing an important segment of nonpublic education [7]—i.e. the Catholic Parochial Schools in the Greater Philadelphia Area.

II. Permitting the Commonwealth to Pay the Eligible Schools Now Is in Complete Harmony With This Court's Decision in *Lemon v. Kurtzman*, Since the Ministerial Act of Payment for Secular Educational Services Already Rendered Does Not Involve the Kind of Undue Entanglement Between Church and State Which Impelled This Court to Hold Pennsylvania Act 109 in Violation of the Establishment Clause of the First Amendment.

Permitting the Commonwealth to make payment now to schools for the secular services they rendered under contract, would not in any sense do violence to this Court's decision in *Lemon v. Kurtzman*. That decision struck down the Pennsylvania Act, not because this Court found that the *purpose* or *effect* of the Act was to advance religion,

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7. It is wrong to automatically equate nonpublic religious schools with Catholic schools only. While the Catholic schools have the largest number of pupils attending church schools, there are in Pennsylvania a wide range of other eligible schools seeking reimbursement under Act 109 who are affiliated with, or run by such divergent faiths as the Society of Friends (Quakers), Lutherans, Presbyterians, Methodists, Episcopaleans, Jewish and others. In varying degrees, they too have identical financial problems that would become even more critical if they were now denied the money they have counted on getting under Act 109 for the school year 1970-1971.

but solely on the grounds that the surveillance and other provisions designed to insure that funds were used solely for secular educational purposes, resulted in undue entanglement between Church and State.

That the decision to deny retroactive application would not offend the rationale of *Lemon v. Kurtzman* is made clear by the lower court in its opinion at 8 app where it stated:

> "The articulated objectives of the Court's entanglement doctrine are, first, 'to prevent, as far as possible, the intrusion of either [government or religion] on the precincts of the other', 403 U. S. at 614, and, secondly, to avoid potential political divisiveness along religious lines. 403 U. S. at 622. With the decision of the Supreme Court in this case and this Court's subsequent entry of summary judgment in favor of plaintiffs and the issuance of a permanent injunction, restraining any future payment of state funds to non-public schools, the statutory scheme which fostered the excessive entanglement between the state and religion has been dissolved. Thus, permitting the allocated funds to be distributed for the 1970-71 school year, would in no way offend the entanglement doctrine as enunciated by the Supreme Court."

Plaintiffs-Appellants throughout their brief contend that permitting payment now for educational services rendered under the Act, would constitute impermissible aid to religion in violation of the mandate of this Court. In advancing such an argument, they have completely overlooked the holding of *Lemon v. Kurtzman*, and continue to contend that the primary purpose and effect of Act 109 was to advance religion. It most emphatically was not.

A. This Court Has Already Held That the Pennsylvania Act Had a Secular Purpose to Aid Education and Not Advance Religion.

This Court held, and it is thus the law of this case, that Act 109 has a secular legislative purpose:

> "Inquiry into the legislative purposes of the Pennsylvania . . . [statute] affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the . . . [statute itself] clearly state[s] that it is intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislature meant anything else. *A state always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in Allen, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.*" 403 U. S. at 613. (Emphasis added.)

For this reason, the not so subtle intimations in Appellants' brief that Act 109 is part of a plot to evade the Constitution and aid religion [8] (e.g. Appellants' brief pp. 4, 31) are not only unsupported [9] and unjustified, but are irrelevant in light of this Court's clear holding that Act 109 evidences a proper secular purpose. Appellants pressed their position upon this Court in the previous appeal,[10] and

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8. The fact that after this Act was held unconstitutional the legislature pursuant to its finding of grave public need tried to find a way within the Constitution to meet this need is irrelevant in light of this Court's holding that Act 109 had a secular purpose.

9. The presence on the record of support of the Pennsylvania Association of Independent Schools for Act 109 conclusively demonstrates the inaccuracy of such an accusation.

10. See Footnote 5.

this Court, as the above quotation demonstrates, refused to make such a finding. Now, without any factual basis or record, appellants again press the question this Court has already decided.

In not deciding whether the principal or primary effect of the statute was one which either advanced or inhibited religion, 403 U. S. at 613,—despite Appellants' contentions to the contrary (Appellants' brief Oct. Term 1969, No. 1189, pp. 6, 7 Addendum)—this Court left undisturbed the finding of the lower court that the Pennsylvania statute did not do so, 310 F. Supp. at 47.

B. Payment of the Money Owing for Services Performed Is Not Unconstitutional as "Excessive Entanglement".

Your Honorable Court in *Lemon* held that the Pennsylvania Act was unconstitutional because of the "excessive entanglement between government and religion" generated by the Act. 403 U. S. at 614. As correctly noted by the court below, the articulated objectives of this Court's entanglement doctrine are first, "to prevent, as far as possible, the intrusion of either [government or religion] into the precincts of the other," 403 U. S. at 614, and secondly to avoid potential political divisiveness along religious lines. 403 U. S. at 622.

The emphasis of the entanglement doctrine is the potential for *future* entanglement and encroachment of each upon the sphere of the other in a *continuing* relationship where the province of each becomes increasingly less distinct. Thus, this Court, expressing concern regarding a relationship "*pregnant* with danger" stated, "A comprehensive, discriminating, and *continuing* state surveillance will *inevitably* be required to insure that these restrictions are obeyed and the First Amendment otherwise respected,"

403 U. S. at 619 (emphasis added), and warned against the "*continuing* relationship between church and state". 403 U. S. at 622 (emphasis added) and 403 U. S. at 612, 613, 617-619 and 621 [11]

Clearly the injunction awarded by the court below, prohibiting the spending of funds under the Act after the date of this Court's decision, forecloses all possibility of any continuing relationship or encroachment.

The second aspect of this Court's concern with entanglement is political entanglement into the realm of religion:

> "The potential for political divisiveness related to religious belief and practice is aggravated in these . . . statutory programs by the need for *continuing annual appropriations* and the likelihood of larger and larger demands as costs and populations grow." 403 U. S. at 623. (Emphasis added.)

Since the lower court has enjoined payments under the Act after this Court's decision, neither political entanglement nor entanglement between government and religion is any longer an issue as to these payments. The money has been collected. The state is ready to pay, and the funds are precisely allocated from a designated fund.

The schools' applications for contracts have already been reviewed, approved, the contracts let, and services

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11. The Court's opinion in *Lemon* makes patently clear that Act 109 was stricken because of its potential for undue entanglement in the *future*, and not because the Court found any present evidence of an impermissible aid to religion. Thus the Court refers to "dangers" (that religion *will permeate* secular programs) "to a substantial degree". 403 U. S. at 617; and at 618, the Court refers to "the *potential*, if not the actual hazards . . . ."

rendered. All that is required is for the State to satisfy itself, if it hasn't already done so, that the amount of reimbursement is proper—i.e. that the designated number of pupils were in fact enrolled in the schools and in the specific courses for which payment in now sought. This is a pure ministerial act—an administrative matter no more than that involved in *Board of Education v. Allen*, 392 U. S. 236 (1968), or any other law which has been held to be constitutional, withstanding attack under the Establishment Clause.

Furthermore, subsequent appropriations will be not only unnecessary but unavailable because of the injunction of the lower court. This issue thus does not enter the political arena.

C. The Decisions of This Court Do Not Prohibit All Direct Payments to Sectarian Educational Institutions.

Appellants misinterpret *Lemon*, citing it for the proposition that *any* direct payment to church-related schools contravenes the Establishment Clause "without regard to the additional problems raised by the entangling control provisions of the statute", (Brief of Appellants, p. 17), citing Justice Brennan's separate opinion in *Lemon* and *Dicenso*, and *Tilton v. Richardson*, 403 U. S. 672 (1971). Not only is this proposition contrary to the holding of *Lemon*, but it has been specifically rejected by this Court.

Tilton, decided the same day as *Lemon*, upheld as constitutional federal grants for physical facilities to church-related educational institutions. It thus affirmatively established that the mere existence of a direct payment is not

in and of itself sufficient to void an act as contrary to the Establishment Clause of the Constitution.[12]

III. The Lower Court's Determination That a Balancing of Equities and General Principles of Fairness Compelled Giving Prospective Effect Only to This Court's Decision in *Lemon v. Kurtzman* Is Overwhelmingly Supported by the Record.

Appellants, in their zeal to deny to the eligible nonpublic schools reimbursement of moneys which they expended, and would not have expended without the Commonwealth's promise, now belatedly attempt to change the facts and argue:

¶ that there was no reliance by the schools,

¶ that such alleged reliance, if proved, was not justified;

¶ that there were no valid contracts and that the moneys paid constituted a subsidy to which the schools were not entitled.

As developed below, there is no basis in fact for their factual contentions. With respect to the legal arguments advanced, they are the same arguments advanced by Appellants in the original briefs to this Court on the merits and which were specifically rejected or not adopted by the Court as its grounds for voiding the statute under attack.

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12. If Appellants' argument were accepted, the schools must also repay funds already paid under the Act for services rendered during the 1969-1970 school year. In fact, Appellants have never made such an assertion, probably in recognition of the lack of legal precedent to support such a proposition and the extreme harshness of such a proposal.

A. Appellants Have Already Admitted That the Schools Relied Upon the Constitutionality of Act 109 and in Good Faith Made New Expenditures and Incurred Expenses and Debts They Would Not Otherwise Have Incurred Except in Reliance Upon the Commonwealth's Promise to Reimburse Them.

Appellants in the lower court admitted the reliance of the 1,181 schools having contracts with the State for services.[13] Appellees never denied any reliance in their pleadings. In fact, under New Matter, paragraph 6, Appellants admitted that acts were done or expenditures were made in reliance upon the constitutionality of the Act, but alleged that the parties proceeded at their own risk (A16-A17). And as pointed out in the Statement of the Case of this brief at page 5 above, plaintiff appellants admitted that the defendant schools made new expenditures, and incurred expenses and debts they would not otherwise have incurred except in reliance upon the Commonwealth's promise to reimburse them.

Appellants base their principal argument of unjustified reliance on the fact that the schools did not sign reimbursement contracts for the 1970-1971 school year until a month after an appeal had been filed in the Supreme Court (Appellants' brief p. 32). However, the date of signing of reimbursement contracts, January 1970, was the date that said action was required by the Superintendent of Public

13. The question of reliance or nonreliance may well be legally irrelevant in these proceedings, for as discussed below, the question here is not whether the schools have a *contractual* right to receive, and the Commonwealth has a *contractual* duty to pay—but only whether there is a First Amendment *constitutional* prohibition that prevents the Commonwealth from making payments. Only in the event of the latter finding, would reliance become germane, i.e. in deciding on the equities, whether the payment should still be allowed. Thus, if the potential evil which this Court was attempting to prohibit is entanglement, the issue of reliance does not even arise.

Instruction as set forth under the Act (24 P. S. § 5605, 16 app., Jurisdictional Statement). While the schools were aware that the decision of the lower court upholding constitutionality was to be challenged, the schools relied, in good faith, as they were entitled to:

¶ Upon the presumption of constitutionality which attaches to any act (see discussion below);

¶ Upon the decision of the lower court which upheld the Act; and

¶ Upon the fact that no action was taken by plaintiffs to enjoin payments for prior years.

There is no doubt that the presumption of constitutionality attached to Act 109 upon its signing into law. *Philadelphia v. Depuy*, 431 Pa. 276, 244 A. 2d 741 (1968). It is the strength of this presumption of constitutionality that demonstrates the weakness in Appellants' argument concerning reliance.

Appellants attempt to show that the schools could not rely on the constitutionality of Act 109 by stating that the Act was understood from the beginning as a calculated effort to skirt the shoals of the First Amendment and the right to further subsidies are no more available to said schools than it would be if a state had enacted state aid to a segregated school (Appellants' brief p. 34). This argument suffers from two fundamental errors.

The first is the finding by the Court in *Lemon* that the statute had a secular legislative purpose:

> "Inquiry into the legislative purposes of the Pennsylvania . . . [statute] affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the . . . [statute itself] clearly [states] that [it is] intended to enhance the quality of the secular education in all schools covered by the com-

pulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in *Allen*, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference." 403 U. S. at 613.

Moreover, there is no parallelism between state aid to a segregated school and the statute here in question. Long standing decisions by this Court clearly indicate that segregation is against the law of this land, and a state may not give aid thereto. However, as noted by Chief Justice Burger in this case,

> "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall', is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." 403 U. S. at 614.

B. The Commonwealth and Contracting Schools Entered Into Valid and Binding Contracts for the 1970-1971 School Year, and Services Have Been Performed Under, and in Reliance on Those Contracts.

The Commonwealth and the schools have consistently maintained that the agreements for the purchase and sale of secular services are valid and binding contractual agreements. Appellants, on the other hand, have argued that the contracts were fictional devices created by the Legislature in an attempt to circumvent the Constitution (Appellants' brief pp. 33-34). However, as discussed above, this argument, previously pressed by Appellants (Appellants' brief, October 1969, No. 1189, at pp. 30-36), was rejected by

the three judge court in its opinion of November 28, 1969, 310 F. Supp. 35, 39-40, and by this Court, 403 U. S. 602, 610 and the three judge court in 1972.

Undaunted by these facts, Appellants now argue that this Court implicitly found that the purchase-of-services device was fiction. In support of this argument, plaintiffs argue that the Supreme Court "invariably" put quotation marks around the word "contract" and that it used the terms "subsidy" or "aid" in the Opinion. See Appellants' brief at pp. 27-29.

Contrary to Appellants' assumption that the use of quotation marks around the word "contract" denotes this Court's disbelief or amusement over the term, it is perfectly clear that this Court was merely quoting from the text of Act 109. See 403 U. S. at 609-610, where the Court liberally quotes from the Act and properly uses quotation marks around many phrases from the Act—"secular educational service", "presented in the curricula of the public schools", "secular", etc.

Surely, if this Court intended to mean that the Legislature was guilty of deception and that the above phrases were hocum, the Court would not have held, as it did, that the Legislature's declaration of purpose was entitled to deference, and that the Act's purpose was not to advance religion. 403 U. S. at 613. Furthermore, in setting forth the history of the Pennsylvania program, the Court stated that the state had entered into contracts, and we may add, without the quotation marks relied on by plaintiffs:

> "The State has now entered into contracts with some 1,181 nonpublic elementary and secondary schools with a student population of some 535,215 pupils—more than 20% of the total number of students in the State." 403 U. S. at 610.

Finally, the Court did not invalidate the Act on the basis of any characterization of the legal relationship be-

tween the Commonwealth and the schools, but solely on the basis of entanglement. Therefore, Appellants' argument attacking the existence of the contracts must be rejected.

C. Appellants Have No Standing to Argue That the Commonwealth Did Not Receive Value Under the Contracts.

The Commonwealth has joined with the schools in asserting that it has a legal obligation to pay the schools for services rendered in the 1970-1971 school year. In so doing, the Commonwealth has indicated that it has received value for the payments. Indeed, the Declaration of Legislative Purpose and Findings, *which have been duly accepted by the Supreme Court,* rests on the finding that the Commonwealth is satisfied and is ready, willing and able to pay out the funds.

Appellants, however, in attempting to block the payment, argue that the Commonwealth has not received a "quid pro quo" under the contracts. See Appellants' brief at pp. 27-28.

Aside from the factual inaccuracy of this charge and the fact, as discussed above, that this Court rejected Appellants' attack on this ground, Appellants lack standing to present this argument. See *Data Processing Service, Inc. v. Camp,* 397 U. S. 150 (1970).

Defendants recognize that Appellants may have standing to attack Act 109 and the payments on constitutional grounds, but this does *not* mean that they have standing to challenge the payments *on any other grounds.*

Thus, Appellants could not argue that the contract between the Commonwealth and any particular school should be set aside because they believe that the school has a mathematics department not to their liking, *or for any*

other reason that does not rise to constitutional proportions. The attack on the value received clearly does not rise to that required level and therefore mandates dismissal of the argument.

Secondly, Appellants cannot raise the quid pro quo argument because they will not be injured in any way by the payment of the funds. Appellants might have had standing to challenge the payment if the Court had held that Act 109 violated plaintiffs' Free Exercise or Equal Protection rights. However, the Court went off *exclusively* on entanglement which does not involve any of the foregoing personal rights of the plaintiffs. Bereft of any evidence of economic or other injury *in fact* from the payment, plaintiffs have no standing. See *Data Processing Service, Inc. v. Camp, supra.*

Finally, even if Appellants could show an injury sufficient to give them standing, another fundamental principle of standing prohibits them from raising the quid pro quo argument—that is, *that a party may not assert rights belonging to another person. Tileston v. Ullman,* 318 U. S. 44 (1943). Here, any right to invalidate the contracts for alleged lack of mutuality or value belongs to the Commonwealth *and only to the Commonwealth.* The Commonwealth, however, has stated its satisfaction with the contracts and the schools' performance, and is prepared to make the payments. Appellants lack the capacity to contradict that decision.

D. The Lower Court Properly Balanced the Equities in Limiting Its Injunction Order to Prospective Action.

1. The Financial Crisis Facing Nonpublic Education.

Appellants in their brief at page 26 state that "only the most compelling circumstances have been found ap-

propriate by this Court to limit a judicial ruling to a prospective application." They then go on to make the rather extraordinary argument that compelling circumstances are justified in the field of *municipal bond financing* but should not apply to such vital institutions as our *nonpublic schools.*

As pointed out in the Gurash Report (see attached Appendix B, pages 4-6) there is no institution more precious to the survival of a free democracy than our total educational system, with our local and national commitment to pluralism. See in particular the words of President Nixon (at page 4 of the Gurash Report) where, in a speech on August 17, 1971, he addressed himself to this problem and stated:

> "In the homes, churches and schools of this nation, the character of the coming generation is being forged. We must see to it that these children are provided with the moral, spiritual and religious values so necessary to a great people in great times. *As we see those private and parochial schools,* which lay such stress on those values, *close at the rate of one a day,* we must resolve to stop that trend and turn it around. And you can count on my help in doing just that." [Emphasis added]

2. Plaintiffs Should Not Be Permitted to Belatedly Prevent Payment When They Failed to Exhaust Their Judicial Remedies—i.e., a Right to Seek a Temporary or Preliminary Injunction, and Appeal the Denial Thereof to This Court.

As developed in the Statement of the Case, (see pages 2 through 5) and as amplified in the Conclusion below, plaintiffs totally failed to exhaust their legal remedies by

seeking, and appealing if necessary, the denial of a request for a preliminary injunction.[14]

Now they belatedly attempt to block payment. It is too late. The lower court would not countenance it—and we respectfully submit, neither should this Court.

CONCLUSION.

Appellants won a landmark victory before this Court in having Pennsylvania Act 109 stricken down—albeit not on the grounds they advanced in their briefs to this Court. One would have thought that this would vindicate their efforts, without attempting now to bar payment of the funds earned before the decision, and without putting the schools, who so desperately need these funds, to the additional delay, burden and expense of these appeals. But appellants have a legal right to do so—and so be it.

However, we can not let go unchallenged their erroneous and irresponsible high-sounding appeal to public policy at page 34 of their brief, where they charge the Legislature of Pennsylvania—and indirectly those who seek and support aid to nonpublic education—with conduct tantamount to conspiracy, legislative fraud and an abuse of the judicial process.

---

14. See 28 U. S. C. § 1253 (1966) which reads as follows:

§ 1253. Direct appeals from decisions of three-judge courts.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Thus the charge is made, both thinly veiled and directly asserted,[15] that proponents of aid to nonpublic schools may attempt, or have attempted to and succeeded in getting approval by the Legislature of acts of dubious constitutionality with the knowledge that they can continue to receive the funds in the interim while appeals drag through the courts. Neither the procedural facts in the instant case, nor the workings of the legislative process, nor the judicial procedures for review of state action support such expression of alarm.

Plaintiffs stood benignly by as the eligible schools were reimbursed for their services during the first two years under a decision of the three-judge court which found the Act constitutional. Notwithstanding this adverse decision, they could have pressed for a preliminary injunction to enjoin any and all payments at the time of their original action. If unsuccessful in their petition, they were entitled to an immediate review by the appellate court. But plaintiffs chose not to follow this straightforward route. In fact, as appears from the Statement of the Case in this brief (see pages 2 through 4), they voluntarily withdrew their motion to enjoin the first year's payment and never attempted thereafter to even enjoin payment, let alone appeal to this court had they been turned down.

Rather, at this late date they stand before the Court,—which found Act 109 had a proper secular purpose and re-

15. See, for example, statements appearing in their brief at page 8, and in particular the following language taken from their brief at page 34, which reads as follows:

"One pernicious result of the ruling below is that it may encourage legislatures to continue seeking ways to get public funds into the religious schools through constitutionally dubious means, in the belief that some subsidy is better than none, and in reliance on the lower court's notion that 'contractual' subsidy arrangements entered into before a statute is declared void will safeguard subsequent payment of the subsidy even if only on a temporary basis."

jected the contention that reimbursement in this instance would lead to legislative shams in aid of religion,—and ask for a retroactive ruling enjoining such payments.

Such over-zealous advocacy shocks us. It unmistakenably demeans the legislative and judicial process.

Furthermore, it is precisely this kind of advocacy, by those who unreasonably oppose the legitimate efforts of concerned citizens [16] and dedicated leaders in government and legislators to find a constitutional way to preserve pluralism in education, that prompted Judge Palmieri, dissenting in the recent three-judge court decision in *Committee for Public Education and Religious Liberty v. Levitt*, Civil No. 70-3251 (S. D. N. Y., filed April 27, 1972), to state:

> "To suggest otherwise is to let prejudice against education under religious auspices prevail over wise analysis.* It is a tragic symptom of our time that so simple an objective of a state legislature, simply implemented, should become a focus of objection by those who appear to share deep antipathies and fears with regard to secular education under religious auspices. One is impelled to ask whether the eyes of those who have such fears may be blinded by tragic conflicts now lost in history and which anteceded that of our own Constitution.
>
> I am constrained to decline to participate in destroying this legislative act by judicial action."

* "This comment and those immediately following are not intended to reflect upon my esteemed colleagues but are directed to those who appear to be making a career of this type of destructive litigation."

16. See, for example, the Gurash Report and the make-up of that blue ribbon committee described therein. This nonpublic school crisis is deadly serious. A lot of dedicated people, including the President of the United States, want to see it resolved in a proper constitutional fashion.

For the convenience of the Court, we have attached as Exhibit "A" to this brief Judge Palmieri's dissent in its entirety.

For the several reasons stated in the preceding sections, Appellants' constitutional claims are without merit. The Pennsylvania Association of Independent Schools respectfully submits therefore that the decision of the three-judge court properly decided these issues. Accordingly, the judgment entered by the United States District Court for the Eastern District of Pennsylvania should be affirmed.

Respectfully submitted,

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ROBERT L. PRATTER,
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Attorneys for Appellee
Pennsylvania Association of
Independent Schools.

Of Counsel:

DUANE, MORRIS & HECKSCHER.

EXHIBIT "A".

70 Civ. 3251

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL.,
Plaintiffs,

—against—

ARTHUR LEVITT, AS COMPTROLLER OF THE STATE OF NEW YORK, ET ANO.,
Defendants,

and

CATHEDRAL ACADEMY, ALBANY, NEW YORK, ET AL.,
Intervenor-Defendants.

OPINION

DISSENTING

EDMUND L. PALMIERI, D. J.

PALMIERI, *J.*

I respectfully dissent. The statute under review is, in my opinion, a legitimate exercise of the duty of the state to assure that all children, regardless of the school they

attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law. The private and parochial schools of New York State have been part of a single unitary system of education for many years and they have been under the jurisdiction of the Board of Regents since 1784.

I deplore the incalculable and irreversible harm which will be done by this decision. The statute invalidated by the majority decision is a reimbursement statute. It provides only a fractional reimbursement for the cost of record keeping and testing by non-public schools and required of them by state law and regulation. The record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions. To suggest otherwise is to let prejudice against education under religious auspices prevail over wise analysis.[1] It is a tragic symptom of our time that so simple an objective of a state legislature, simply implemented, should become a focus of objection by those who appear to share deep antipathies and fears with regard to secular education under religious auspices. One is impelled to ask whether the eyes of these who have such fears may be blinded by tragic conflicts now lost in history and which anteceded that of our own Constitution.

I am constrained to decline to participate in destroying this legislative act by judicial action. A vast majority of the legislature of the State of New York, and the Gov-

1. This comment and those immediately following are not intended to reflect upon my esteemed colleagues but are directed to those who appear to be making a career of this type of destructive litigation.

ernor of that state, have determined that this partial reimbursement statute is a legitimate area of state concern and action, free of constitutional restraint. This court today undertakes the serious responsibility of overturning legislative findings of reasonableness. It takes this step notwithstanding the Supreme Court's statement in *Tilton v. Richardson*, 403 U. S. 672, 678 (1971), that

> "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication"

and that "[j]udicial caveats against entanglement" are a "blurred, indistinct and variable barrier." *Lemon v. Kurtzman*, 403 U. S. 602, 614 (1971). It has long been held that separation of church and state cannot mean the absence of all contact. Beginning with state police and fire protection for churches, the theory of allowable contact has expanded with the reimbursement procedures in *Everson v. Board of Education*, 330 U. S. 1 (1947), the allocation procedure for free books in *Board of Education v. Allen*, 392 U. S. 236 (1968), and *Cochran v. Louisiana State Board of Education*, 281 U. S. 370 (1930), and the administrative relationships inherent in the tax exemption in *Walz v. Tax Commission of the City of New York*, 397 U. S. 644 (1970).[2] If, as the Supreme Court pointed out in *Allen, supra* at 247, a state "has a proper interest in the manner in which those [private] schools perform their secular educational function," then that interest is appropriately implemented here. I can perceive nothing in the decision of the Supreme Court in *Lemon v. Kurtzman* and *Earley v. DiCenso*, 403 U. S. 602 (1971), which requires the conclusions reached by the

2. This language is borrowed substantially from P. O. A. U. v. Essex, 28 Ohio State 2d 79 (1971).

majority. There is neither entanglement nor involvement between church and state, let alone "the excessive government entanglement with religion" condemned in that case, *supra* at 613, and in *Walz, supra* at 674. Indeed, reimbursement for attendance and examination services duly performed by operation of law is clearly within the guidelines established by the Supreme Court in *Lemon-Earley* where it said (at page 616) that its "decisions from *Everson* [*supra*] to *Allen* [*supra*] have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials."

Accepting, as I believe we must, the basic premise that no perfect or absolute separation between religion and government is really possible, see *Walz v. Tax Commission of the City of New York, supra* at 670, I agree patly with the views of Judge Oakes very recently expressed in the case of *Americans United for Separation of Church and State v. Oakey* (D. Vt., No. 6393, March 6, 1972) that we should "search for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and uni-governed societies elsewhere in the world."

I would hold that this statute neither on its face nor as applied by the defendants is unconstitutional, and I would dismiss the complaint on the merits.

EDMUND L. PALMIERI
Edmund L. Palmieri
U. S. D. J.

Dated: April 27, 1972

EXHIBIT "B".

Gurash Report—Financial Crises of Catholic Schools in Philadelphia and Surrounding Counties.

THE REPORT OF THE ARCHDIOCESAN ADVISORY COMMITTEE ON THE

FINANCIAL CRISES OF CATHOLIC SCHOOLS

IN PHILADELPHIA AND SURROUNDING COUNTIES

JOHN T. GURASH CHAIRMAN

Philadelphia, 1972

THE
REPORT OF THE
ARCHDIOCESAN ADVISORY COMMITTEE
ON THE
INANCIAL CRISIS OF CATHOLIC SCHOOLS
HILADELPHIA AND SURROUNDING COUNTIES

JOHN T. GURASH
Chairman

1972

FOREWORD

This report of the Advisory Committee on the Catholic Schools which has been approved by all members, is, we believe, the most comprehensive survey of their problems — and the relationship of their plight to the difficulties facing the public schools — that has ever been made anywhere in the United States.

In large measure this must be credited to the cooperation of John Cardinal Krol, Archbishop of Philadelphia, and his aides, who gave the committee's staff unprecedented access to data of all kinds. These data included not only enrollment and financial records of the Catholic schools, but also statistics on parish finances, on novitiates and seminary applications, and many other related factors.

It took courage and resolution to open such records for examination by an impartial, non-sectarian committee of laymen, and I know that the members of the committee join me in expressing our appreciation of Cardinal Krol's determination to make full disclosure of the facts, in order to help the community to accurately assess the full dimensions of a crisis whose impact will be felt by the community as a whole, and not merely by Catholics.

The committee came into being as a result of a letter from Cardinal Krol to me on July 22, 1971, asking me to select and head such a group. In the ensuing conversations and correspondence, we agreed that an advisory committee of the kind he proposed could best serve the community in three ways:

—By bringing up-to-date and making all-inclusive a study which had been made of the public schools' financial straits, for it is self-evident that a collapse of the Catholic school system would aggravate the public schools' difficulties to an almost unimaginable degree.

—By bringing the up-dated study to the attention of various segments of the community, including civic and government leaders, the labor movement, businessmen, and others.

—By opening a dialogue where Catholic and non-Catholic alike could contribute ideas towards the solution of a problem that the entire community shares.

It was specified, however, that the advisory committee would not be asked to undertake research or submit recommendations relating to governmental aid at any level, to legislative action, or to parish aid, nor would the group engage in fund-raising appeals.

Thirty leading citizens of the Philadelphia area, representing business, labor, government, education, and the community at large, agreed to serve on the advisory committee. This group included men and women of various religious, ethnic, and social groups. It was as true a cross-section of the total community leadership as one could wish.

Under the direction of the committee, a technical staff obtained, analyzed, and interpreted the facts concerning the impact of the Catholic schools on the economic and social development of the Philadelphia metropolitan area, as well as the current financial condition of the Catholic schools and projected trends.

In addition to the records of the Archdiocese and its parishes, the committee's staff also drew upon expert advice, opinion, and factual studies from several outside, independent sources.

This report, which deals solely with the factual circumstances as they exist and are expected to develop in the months and years ahead, will serve as a basis for the discussion of the options which are open to our community in its efforts to cope with the crisis in Catholic and public education today. In the immediate future the committee will present an outline of these options to Cardinal Krol.

As the community dialogue on this problem begins, let us bear in mind that what we are talking about is not really a "Catholic problem" at all, but a dilemma of our total society, and that Americans of every faith — and of none — have a stake in its solution. The education of every child is the concern of every citizen.

When I announced my acceptance of the chairmanship of this committee, I told the press: "I cannot prejudge the work of this committee by speaking in any detail about the future, but I can say this: An America without a strong network of non-public schools would be a nation which had lost one of its great strengths. I do not think this country can afford to let that happen."

After many months of work and deliberation, the committee as a whole shares my conviction. Now we solicit the help of the entire community in determining how our society should confront this challenge to its pluralistic strength.

John T. Gurash
Chairman

Philadelphia, 1972

SOCIAL ASPECTS OF THE PROBLEM

This report from the non-sectarian Catholic School Advisory Committee appointed by Cardinal Krol deals with the facts which the Committee finds and believes to exist with respect to the diocesan high and parish elementary schools in the Archdiocese of Philadelphia, and particularly those schools within the City of Philadelphia.

The Committee has made these findings and estimates based on lengthy studies conducted by experts in the fields of Economics, Finance, and Education, as set forth more fully in the body of the report.

I. This report focuses mainly on the facts concerning the economic and financial aspects of education in the Catholic Schools in the Archdiocese of Philadelphia, and the facts and estimates concerning the tremendous financial impact the closing of Catholic Schools would have upon the finances of the Philadelphia Public School System. However, education encompasses other and broader factors which involve not only our economic life, but also the entire spectrum of social, political, and spiritual values that are part of the fabric of life in a free society.

It is in that area, also, that non-public education makes an enormous contribution.

The teaching of duty, responsibility, hard work, frugality, ethics, and proper conduct are part of America's past and are desirable and important for America's future. President Nixon, in a speech on August 17, 1971, stressed the importance of the non-economic facets of education, when he said:

"In the homes, churches and schools of this nation, the character of the coming generation is being forged. We must see to it that these children are provided with the moral, spiritual and religious values so necessary to a great people in great times. As we see those private and parochial schools, which lay such stress on those values, close at the rate of one a day, we must resolve to stop that trend and turn it around. And you can count on my help in doing just that."

This Committee endorses and supports this statement by the President of the United States.

II. Catholic and other parochial schools are committed to an educational philosophy involving morals, conduct, and spiritual as well as intellectual excellence.

While most non-public school children are in Catholic schools, they are also to be found in schools conducted under Jewish and Protestant auspices. By virtue of the demands made upon them and the services they have provided historically, Catholic and other non-public schools are in fact fulfilling a public need. The Jewish scholar, Will Herberg, said:

"Parochial schools . . . perform a public function, supplying a large

...er of children with an education that is everywhere taken as the equiv-...ent of the education given in public schools."

...ethodist Bishop Fred Corson said:

"They (the Catholic schools) have broadened the purposes of parochial ...ucation and have associated it more closely to a philosophy of life rather ...an the perpetuation solely of a sectarian position. They have encouraged a ...illingness to adjust to meet the changing needs and they have introduced the ...tire community to the contributions made by private education and the ...roblems involved in a pluralistic society."

...I. The American tradition of educational diversity has been a great ...rength to our educational system and should be preserved.

...merican society needs and grows on educational diversity. Catholic and other ...on-public schools offer and provide an important educational alternative to ...e community.

...V. The individual citizen's right to choose the kind of education which he ...ishes his children to have is an important right and should be preserved.

...atholic schools provide all parents with an opportunity for expressing a ...eedom of choice about education. This concept of diversity or freedom of ...hoice for parents received strong backing from the United States Chamber ...f Commerce Task Force Report on American Education, which pointed ...ut that:

"We take this diversity for granted in scholarship, in politics, and in the ...bundance and variety of the commercial marketplace. Why settle for the ...ingle choice in education? . . . We think it desirable that parents have a choice ...f schools for their children . . . Different schools, none of them perfect, will ...ave different combinations of strengths and weaknesses. Parents . . . should ...e able to choose to find the combination that best satisfies them and their ...hildren."

...ot to be overlooked in this connection is the importance of the right an ...ndividual citizen has to select for his children a combination of secular educa...ion and religious education.

...I. Catholic schools are a stabilizing factor in the life of our urban ...ommunities.

...he existence of good Catholic schools in the area acts (as do good schools ...enerally) to strengthen a community and as a strong retentive force for the ...opulation. The schools provide a focal point for neighborhood identification, ...ommunity pride, and, consequently, lend social and economic stability. These ...chools enhance the quality of life in our cities and suburbs. They are an ...mportant community asset, attracting and retaining in each community sub...tantial numbers of hard-working financially stable families.

...VI. The example set by the Catholic schools of efficient and economically

constructed and operated facilities is also important.

The spur of competition is good for all schools — public, parochial, or private — fostering constant evaluation and reevaluation of objectives, performance, use of resources and economy. The existence of Catholic schools provides for other schools another benchmark or standard for evaluating educational effectiveness and other measures of performance.

VII. In addition to the foregoing, the resources committed to supplying Catholic education in the Philadelphia area provide this community with:

- a quality education for one out of three children in the City of Philadelphia and comparable numbers in the four surrounding counties.
- an important source of a skilled labor force and an educated citizenry.
- a source of community and business leaders.
- a full range of student activities which provide educational, social and recreational services to the community at large and develop in the students themselves a sense of social responsibility.
- substantial facilities and personnel to undertake the education of minority groups and the poor. This aspect of social contribution of Catholic resources was prominently noted by President Nixon in his Message on Educational Reform, March 3, 1970, in which he comments:

"They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans."

These resources exist today and represent potentially a powerful instrument for social awareness and change. The resources so committed should be conserved along with our other national resources.

The community stake—both economic and social—is high. Independent of full acceptance of the benefits claimed or value judgments implied, the Catholic and other non-public schools of the Philadelphia community are a substantial factor to be reckoned with and assessed.

VIII. There exists between the public and parochial school system of Philadelphia a large measure of interdependence, cooperation and interaction.

The importance and significance of the close working relationship between the two systems—and their effects upon each other—were spelled out very clearly by the Philadelphia Board of Education and the Philadelphia Archdiocesan Board of Education. Calling for a joint solution to their common problems, together they stressed:

"The education of the children of Philadelphia depends upon the strength of two great educational systems: the public school system and the parochial school system. Each is essential to the welfare of the city and its children; each is fundamentally dependent upon the other. If one suffers, the other inevitably suffers."

On the following pages are the facts as to the costs associated with providing the benefits outlined briefly above. At the same time, this report identifies the best estimates the experts employed by this Committee can make as to the huge costs to the Public School System of providing those same or similar serv-

ices—educational and social—should the Catholic schools no longer be able to do so.

This brief reminder of the benefits provided to the community by the Catholic schools provides a fuller context for evaluating the hard facts of the financial crises confronting Catholic schools in the Archdiocese of Philadelphia. The economic impact on the community is clear. The key questions for the community are:

Are the benefits worth the costs?

If so, how can these costs be met, and these benefits retained?

SUMMARY

Background

In his educational reform message to Congress on March 3, 1970, President Nixon stated:

"The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment . . . supplementing in an important way the main task of our public system."

Throughout the country, the Catholic school system constitutes the major element among non-public schools. In the City of Philadelphia, for example, 9 out of 10 children educated in non-public schools attend a Catholic school. Nowhere is the significance of Catholic schools as contributors to the education of young Americans more apparent than in Philadelphia.

The school system of the Archdiocese of Philadelphia is comprised of more than 300 elementary and secondary schools in Philadelphia and its four surrounding counties (Bucks, Chester, Delaware and Montgomery). These schools provide educational services to over 230,000 children — 75 percent of whom are elementary students. In Philadelphia alone, one out of three children is educated in a Catholic school.

While there is general awareness of the high cost of education, only recently has attention focused on the financial crisis confronting Catholic school systems throughout the nation. Several studies, including one being developed by a panel of the President's Commission on School Finance, have been commissioned to determine the scope of these financial problems. Philadelphia Catholic schools also are faced with serious financial problems. What has been lacking is community awareness of the specific dimensions of these problems.

Purpose

The purpose of this report is to provide the facts about the present and projected financial condition of the Archdiocesan School System. The information developed is intended to:

1. serve as a basis for assessing the magnitude of the financial problem;
2. establish the facts required to promote community awareness;
3. provide the basis needed to formulate and evaluate alternative courses of action which can be recommended to the Archdiocese.

Major Findings

Our analysis covered key educational and financial data from both parish and school sources. Results of our analysis may be summarized as follows:

A. **There is a deficit now.** Analysis of the most recently available data provides new and important insight into the financial condition of parishes and schools in the Archdiocese of Philadelphia. In the fiscal year 1970, all parishes combined operated at a net deficit of $1.2 million. In addition to deficits ex-

perienced in the parishes, separate accounts for the elementary and the secondary schools showed that elementary schools incurred deficits of $193 thousand, while high schools spent $804 thousand more than available revenues. The combined school operation deficit for 1970 was, therefore, $997 thousand. Thus, the total deficit for 1970 incurred by the three operations — parish churches, elementary schools and diocesan high schools — was $2.2 million. During fiscal 1971, the deficit in parish operations alone jumped to $5.1 million, a four-fold increase over 1970. Although complete school financial data is not yet available for 1971, there is every probability that the total deficit will increase, due mainly to the elimination of state aid.

B. **Deficits will continue and will grow during the next several years.** Projections covering the school years 1972-73 (fiscal '73) to 1974-75 (fiscal '75) indicate that by 1975 the cumulative deficit in the schools will reach $55.4 million. That projection represents the deficit resulting from a concatenation of most probable conditions. The deficit could be as high as $84.1 million, or as low as $43.1 million. Deficits projected for the combined elementary and secondary schools appear graphically in Charts I, II and III, respectively.

Chart I

ARCHDIOCESE OF PHILADELPHIA – COMBINED ARCHDIOCESE PROJECTED CUMULATIVE DEFICIT – FISCAL 1973 THROUGH FISCAL 1975 ($ MILLIONS)

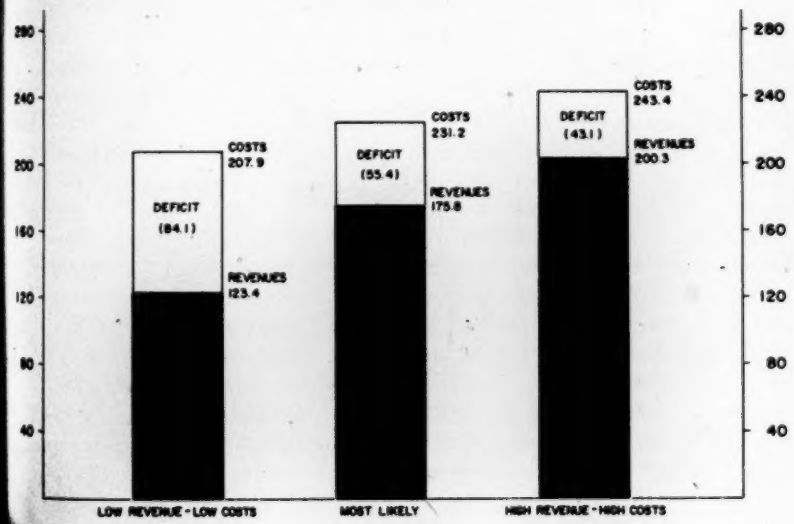


Chart II

ARCHDIOCESE OF PHILADELPHIA – ELEMENTARY SCHOOL
PROJECTED CUMULATIVE DEFICIT – FISCAL 1973 THROUGH FISCAL 1975
($ MILLIONS)

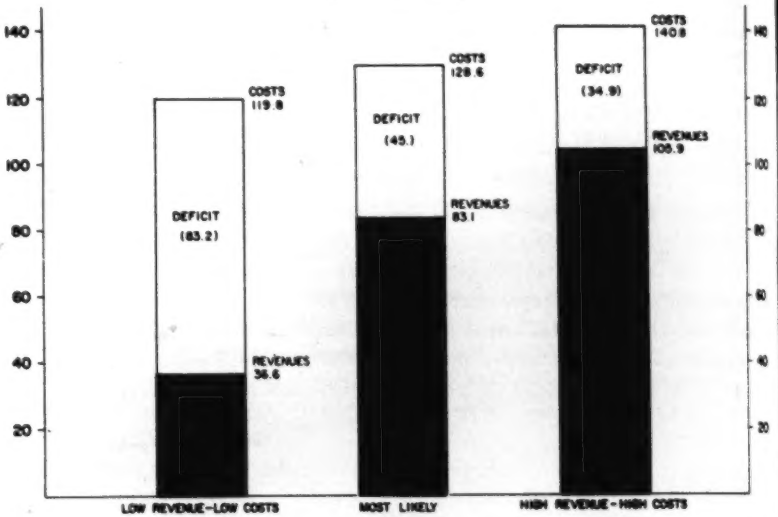
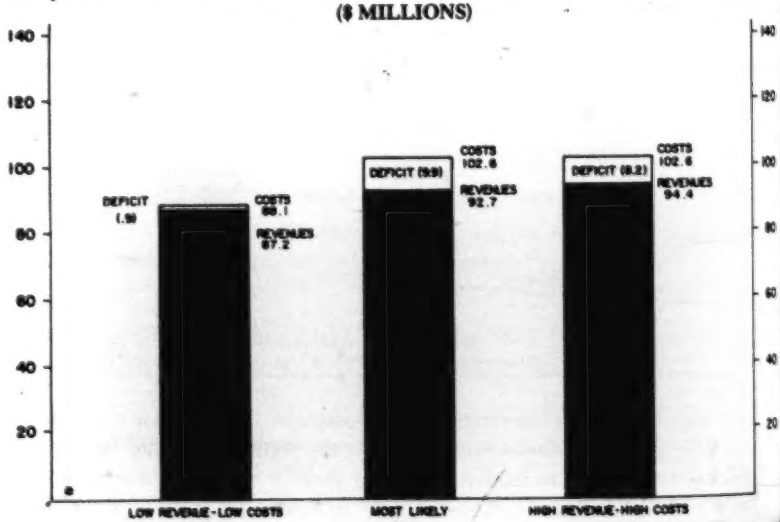


Chart III

ARCHDIOCESE OF PHILADELPHIA – SECONDARY SCHOOLS
PROJECTED CUMULATIVE DEFICIT – FISCAL 1973 THROUGH FISCAL 1975
($ MILLIONS)



Underlying the most likely cumulative deficit of $55.4 million is a $13.5 million deficit during fiscal '73, which rises to $19.0 million during fiscal '74 and climbs to $22.9 million in the school year 1974-75. During these respective years, it is expected that parishes will also be operated at combined cumulative deficits of more than $35 million, creating a projected total church and school operating deficit of $90.4 million.

C. **Revenues will fail to keep pace with costs.** A key factor determining future prospects for Catholic education is, of course, the ability of the church and schools to generate revenues sufficient to keep pace with costs. The cornerstone of the Catholic financial structure is the parishioner contributing through his church. The parish collection is the prime source of revenue funds needed to support the elementary school system, contribute financial support to the secondary schools, and provide for parish needs. Most signs point to a reduced flow of funds from the parishes. Parish revenues, derived mainly from church collections and socials, virtually stopped growing in 1971. Total operating receipts, for the combined parishes of the Archdiocese, increased by less than one percent during fiscal '71. When parish revenues cease to expand, pressures develop in elementary and secondary school budgets. **Nearly 46 percent of all parish revenues are used to support education.** Funding elementary schools takes 33 percent of total parish revenues; another 13 percent of parish revenues is channeled into the high school system from the parishes. At the elementary school level, parish funds represented 76 percent and 67 percent of the total elementary school budget in the years 1970 and 1971, respectively. Obviously, any diminution of the flow of funds through the parishes must have a substantial direct impact on school budgets. The main source of parish revenues (collections, which produce approximately 60 percent of revenues; and socials and donations, which provide another 16.5 percent of total revenues) are not growth-oriented sources. Experience in recent years indicates slower growth in revenues from the parish is likely to continue over the next four years. **If historical contribution rates are adjusted to correct for the effect of inflation, real (or price adjusted) revenues have actually declined in recent years.**

Although recent general economic conditions may account for some decline in contribution rates, evidence suggests that resumption of general economic growth may not yield an upward surge in parish revenues. Analysis of the relationships between average family contributions and average family income indicates that there is a less than proportionate increase in contributions associated with changes in income at higher income levels. The analysis reveals that the average contributor will increase his contribution more if, for example, his income increases from $8,000 to $9,000, than if his income were to increase from $15,000 to $16,000. There is evidence of a diminishing marginal rate of contribution based on income. **Thus, future growth of family income may not be adequate to generate the needed growth in revenues to cover burgeoning costs.**

Combined elementary and secondary school revenues are expected to reach $60.3 million in 1975, expanding at a compound annual rate of growth of 2.4 percent from $56.1 million in 1971-72. These revenues include funds from several sources: parish support and funding, tuitions, student fees and other sources. **But projected revenues fall far short of projected costs.**

D. **Costs will continue their upward spiral.** School operating costs, especially teacher salaries. have strong upward biases. Several factors reinforce the need to recognize the potential for explosive growth in the costs of maintaining the Catholic school system in Philadelphia. Any list of factors that will push costs up must include:

1. **Rising teacher salaries**—teacher salaries in Philadelphia Catholic schools are below national parochial averages. Additionally, unionization of lay elementary teachers and a movement toward an established level of parity even with Catholic secondary salary scales would exert heavy financial pressure on the school system. Further movement in the direction of parity of both Catholic elementary and secondary salaries to public school salary levels would create an added strain on the financial resources of the school system. Any one, or a combination, of these factors occurring would result in substantial cost increases in the operation of the schools.

2. **Declines in the availability of religious teachers**—inability to provide religious teachers to instruct in the schools would prove extremely costly in Philadelphia. The inability of the school system to avail itself of religious teachers (at relatively low salary costs) may arise because of either a lack of numbers of persons entering the teaching religious orders or by the orders themselves changing their mission. Declining ratios of religious to lay teachers translate directly into significantly higher costs — often a doubling of teacher salary costs. The availability in Philadelphia of a few large religious orders committed to teaching is both an advantage and a disadvantage: an advantage in that they lend an element of stability to costs; a disadvantage in that a decision on the part of any one order to change its mission would have a huge impact on salary costs and be a major destabilizing force. Presently, there are no indications of major shifts occurring in the missions of the large religious orders which support education in Philadelphia. However, a declining religious/lay teacher mix can be anticipated, especially in the high schools. As a result, total teaching costs will accelerate more rapidly than might normally be expected.

3. **Improving (declining) student/teacher ratios lead to higher costs** — student/teacher ratios represent one observable variable that may, rightly or wrongly, be interpreted as a measure of quality. It may serve thus as a measure of perceived quality. Further improvement in the student/teacher ratio in Catholic schools and the concomitant increased cost pressures associated with the reductions are anticipated.

Despite all these pressures, costs in the Catholic schools will remain substantially below the public school system when measured on the basis of cost

per student. To illustrate the gap, the cost per student in Archdiocesan schools projected for the year 1975 is $478 per student. Contrast this with the current cost (1971-72) of $1,027 per student in Philadelphia public schools which was estimated by the Federal Reserve Bank of Philadelphia.

E. **Not all schools are operating in the red.** As indicated by analysis of individual school operating statements, there are many schools which are not experiencing deficits currently. Although there is a substantial deficit overall, resulting from the fact that costs are rising at rates approximately three times as fast as revenues, this deficit is not distributed proportionately or evenly over all the schools.

F. **Catholic school enrollments declined in the last several years. Enrollment declines are projected to continue through 1975 and will add substantially, on balance, to the operating costs of the school districts in Philadelphia and surrounding counties.** The net additional cost depends upon projected rates of transfer from the Catholic to the public schools and the effect transfers will have on the amount of aid provided by the state. The cumulative impact over the three year projection period, assuming the rate of transfer implied in the basic forecast (5.7 percent compound annual rate), involves net additional costs in Philadelphia of $20.9 to $29.8 million. Additional costs for the four-county suburban area would be $24.4 million.

If the Catholic schools were to close down at the end of this year (1971-72), and all students were shifted to the public schools, the cumulative additional costs to 1975 would be: Philadelphia — $378.8 to $471.2 million; in the four-county surrounding area, the cost would be $274.8 million. Closing down all schools in the Catholic Archdiocese, therefore, would add an additional $653.6 to $746.0 million in total to operating costs over the next three years in the Philadelphia five county area.

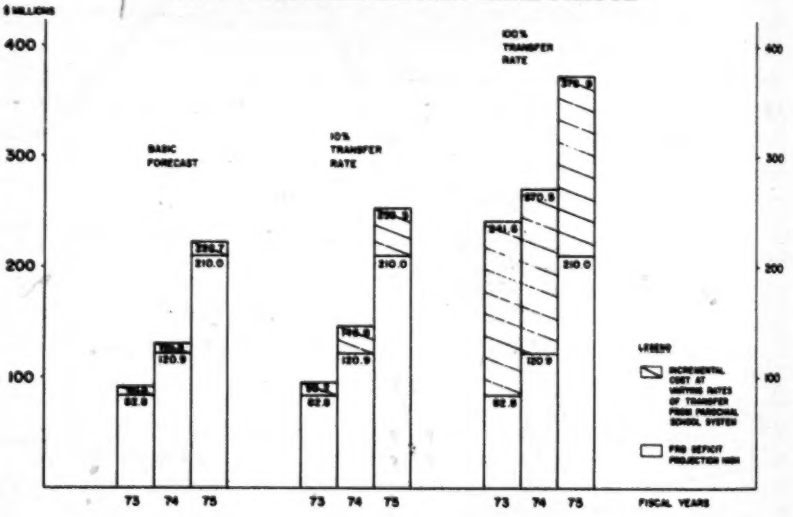
Assuming a longer-term closing pattern, 10 percent per year transfer, additional costs to the public school system in the time period 1972-73 to 1974-75 would be between $140.8 and $157.5 million. This amount is net of state aid, that is, the additional costs have been adjusted to reflect the fact that transfer of students may generate additional state-aid money for the receiving school districts.

Transfer of students from Catholic to public schools may have a beneficial effect on the financial status of the public schools in that state aid may increase. Within the mechanics of the state-aid ratio, it is possible for the state-aid ratio to rise, yielding higher state aid for not only the additional students but for the total receiving student body as well. But full benefits of transfer-induced state aid are not accrued until three years after the transfers occur. Thus, for example, if the Catholic schools were to close in '72, the public schools would receive no additional state aid in 1972-73, only a partial increase in aid in 1973-74, and the full impact in 1974-75 because of the manner in which state aid is calculated.

Comparison of the cost impact of various assumed rates of student transfer

on projected public school deficits is revealing. Shifts of enrollment to public schools in Philadelphia may add between $8.1 to $12.7 million to the public school deficits projected by the Federal Reserve Bank of Philadelphia, if the Basic Forecast proves accurate. Higher rates of transfer will involve, of course, higher additional costs. Immediate closing of Catholic schools (at the end of the 1971-72 school year) would add $158.0 to $162.8 million per year to the public school deficit projected by the Federal Reserve Bank of Philadelphia. A visual comparison of the effects of different assumed rates of transfer on costs is provided in Chart IV.

Chart IV
COMPARISON OF THE COST IMPACT ON PROJECTED PUBLIC SCHOOL DEFICITS OF ALTERNATE RATES OF TRANSFER FROM PHILADELPHIA PAROCHIAL SCHOOL



G. **Tuitions may provide a prime source of additional revenue to schools in the Archdiocese if, in fact, the Catholic community of Philadelphia continues to desire a viable parochial system.** There is no evidence of a strong relationship between changes in tuitions (or student fees as proxy tuitions) and declines in enrollment. To the contrary, evidence to date, and at the levels of tuitions now charged, seems to indicate that the demand for Catholic school education is insensitive to current tuition levels—which is not to say that future demand may not be. The recent increase in high school tuitions in the Archdiocese from $130 per year to $300 per year is outside the range of any prior experience here — real or statistical. It is too early to determine the full impact of that price rise on enrollments, but so far the effect appears minimal.

evidence, however, in the City of Philadelphia that direct charges (tuitions or student fees) in elementary schools are being paid for by an approximately equal reduction in church collections. This means that total support of the parish church-school complex is not likely to change level significantly — rather, parents will redistribute their giving, channeling funds directly into the school budget, by-passing the collection plate.

H. **Management information processes and systems are inadequate.** There is need for development of necessary information and systems for management analysis and control. Presently, ability to cope with the assessment of problems in a rapidly changing financial situation is limited. High levels of demand for sound financial and other key information are likely to be made upon the Archdiocese as the dynamics of the current financial crises unfold. Hard choices are ahead and they require hard information to manage either controlled balanced growth or decline. The current crisis does not appear to have reached the all or nothing stage. **There are options to explore.**

Perspective

The financial crisis pressing on the Archdiocesan schools, supporting parishes, and parishioners, is typical, in many ways, of the problem facing dioceses throughout the United States. In some places, the stage of the problem is more advanced — the communities involved have made their choice of how to solve the problem. Other communities are barely perceiving the existence of the problem. In Philadelphia, the problem is here and now. The time for learning the facts and making the choices is now. For the Catholic community, the time has always been now. There is, however, a new factor — a growing community awareness of the financial crisis facing non-public education, most significantly Catholic schools.

Many proposals for aid are now being discussed at the federal and state levels. There is, for example, **The President's Commission on School Finances,** including "The Panel on Non-Public Education." In Pennsylvania, there is the Mullen legislation for school aid. Legal and constitutional questions are by no means settled. There is considerable discussion about methods to finance education generally — tax credits, value-added taxes, and non-property tax bases. Many solutions have been proposed to deal with the problem facing Catholic education, and the sheer economics of education range from closing down all Catholic schools immediately, to limited consolidation or other forms of managed decline, to constructive cooperative programs between Catholic and public school officials. These programs include such cooperative efforts as shared-time, dual enrollment, programs or released time for religious education.

Summary

This Committee now has with this report:

1. The facts necessary to analyze and assess the financial crisis confronting the Archdiocese of Philadelphia school system.

2. A data base to determine and evaluate alternative courses of action for recommendation to the Archbishop of Philadelphia.

3. Information required to assess the impact of the financial problems of the Archdiocesan school system on the Philadelphia community and local public finance.

What is not available is an in-depth understanding of the attitudes of the Philadelphia area Catholic community. Attitudes reported from other parts of the country may or may not be representative of the attitudes of the Philadelphia community. To fill that gap and provide the correct perspective, a systematic program aimed at determining the basic attitudes of the Catholic community in the Archdiocese of Philadelphia must be pursued.

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